IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Crl.R.No.541 of 1992
Date of decision:24.4.2007

Malkiat Singh

…..Petitioner

v.

State of Punjab

…..Respondent

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL

Present: Mr. Suveer Sheokand, Advocate, as amicus curiae.

Mr.DS Brar, DAG, Punjab.

JUDGMENT:

The petitioner is aggrieved by his conviction under Section 9 of the Opium Act, for which he has been sentenced to undergo RI for one year and to pay fine of Rs.500/-, in default, to undergo further RI for two months, for his allegedly having been found in possession of 4 kgs. and 30 gms. of Opium without any permit.

Case of the prosecution is that on 25.10.1982, SI Krishan Kumar PW3 of Police Station Division No.2, Ludhiana alongwith Constable Jaspal Singh PW1 and Constable Subhash Chander PW2 was on his way from Islam Ganj to Bagh Sufian. At

5 PM, the police party reached near the first block of Public Lavatories and saw the accused coming from the side of Bagh Sufian with a bag. On seeing the police party, he tried to conceal himself and on suspicion, he was over-powered. On search of the bag, he was found carrying Opium wrapped in a glazed paper. A sample was taken in an empty match-box which was made into a parcel and the remaining Opium was separately put in a parcel. After complying with the necessary legal requirements and after receiving the report of the Chemical examiner that the sample carried 4.8% morphine, the accused was sent up for trial.

During trial, the accused jumped bail on 17.1.1986 and was declared Proclaimed Offender. He was again arrested on 3.6.1988.

The prosecution examined HC Jaspal Singh PW1, Constable Subhash Chander PW2 and SI Krishan Kumar PW3.

The accused denied the prosecution allegations. He examined Gopal Singh DW1 to the effect that the accused was arrested in his presence from Sathi Hotel, Gill Road, Ludhaina where the police party asked him to pay the bill of the hotel and on his refusal, he was forcibly taken away on a motor-cycle and falsely implicated.

The trial court, after considering the evidence on record, held the case of the prosecution to be proved beyond reasonable

doubt and convicted and sentenced the petitioner. The accused preferred an appeal, which has been dismissed.

I have heard learned counsel for the parties and perused the record.

Learned counsel for the petitioner submitted that neither any independent witness was examined nor Investigating Officer was examined nor the contraband was produced before the court.

Learned counsel for the State supported the conviction and sentence of the petitioner.

A reference to the record clearly shows that recovery of contraband from the petitioner was duly proved by the testimony of PW1 Jaspal Singh, which was corroborated by PW2 Subhash Chander and PW3 SI Krishan Kumar. The trial court, while noticed in para 8 of its judgment that Krishan Kumar PW3 was the Investigating Officer who had appeared as a witness, observed in para 4 that Krishan Kumar had failed to appear. This observation was clearly mistaken. The lower appellate court in para 7 of its judgment noticed that the observation of the trial court was contrary to record. A perusal of record shows that evidence of Krishan Kumar, Investigating Officer was duly recorded on 12.2.1990 and the case was adjourned for statement of accused and defence evidence. Thereafter in the zimini order dated 24.2.1990, it was mentioned that no PW was present but another zimini order

was passed on the same day that case was for the statement of the accused. Thereafter on 26.3.1990, accused became absent and he appeared thereafter. The contention that Investigating Officer did not appear, is thus, contrary to record.

Coming to the question of non-production of contraband, it is seen that the accused himself had been delaying the trial and remained absent for two and a half years and again absented himself after prosecution evidence was concluded. Before the trial court, the accused did not take the plea of non-production of the contraband. Only arguments raised were about minor discrepancies in the statements of PWs, which were found to be of no significance.

It is well-settled that mere non-production of case property does not by itself vitiate a trial unless prejudice is shown to have been caused to the accused. Reference may be made to a DB judgment of this Court in **Balraj Singh v. The State of Punjab,** 1982 Crl.L.J. 1374, wherein it was observed as under:-

> "15..... Equally if some thing vital turns on it the accused can insist upon its production and the refusal to do so would be a factor for adverse notice against the prosecution by the Court. But in the ultimate analysis, the issue is one of the prejudice caused to the accused and any failure of justice resulting therefrom. In this context the

> question whether such an objection could be, but has not been raised at the earliest stage of trial is of considerable relevance. In a case of innocent or inadvertent non-production of the case property material prejudice is to be shown by the accused in order to claim the vitiation of the conviction. No abstract or absolute rule that "no case property, no conviction", can possibly be raised to the pedestal of a rule of law, because this by itself is likely to occasion a failure of justice. As has been said earlier the substantial issues in a criminal trial like the proof and punishment of crime should not be converted into a plaything of technicalities. If the prosecution has innocently or inadvertently failed to exhibit the case property, yet the accused even though fully represented by counsel makes no objection or grievance thereof at the time of the trial, it would hardly lie in his mouth at the revisional stage to say that all the proceedings stand vitiated even though connived at or wholly condoned by his own conduct.
>
> 16.To conclude, the answer to the question posed at the very outset is rendered in the negative and it is held that the mere non-production of part or the whole of the case property would not by itself vitiate the subsequent conviction of the accused."

As regards independent witness, non-examination thereof by itself does not create any doubt about prosecution case,

if the evidence of official witnesses is reliable. Reference may be made to judgment of Hon'ble the Supreme Court in ***Appabhai and another*** v. ***State of Gujarat*** AIR 1988 SC 696, wherein it was observed:-

> 11.....It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether -in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused.....

In ***Pradeep Narayan Madgaonkar etc. etc.,*** v. ***State of Maharashtra*** AIR 1995 SC 1930, it was observed:

> "**11**. …Indeed, the evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the Investigating or the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars

> should be sought. Their desire to see the success of the case based on their investigation,requires greater care to appreciate their testimony……"

It may also be noticed that both the courts below having concurrently believed the evidence of prosecution witnesses, conviction of the petitioner is not liable to be interfered with in exercise of revisional jurisdiction, merely because a different view may be possible.

In ***State of Kerala v. Puttumana Illath Jathavedan Namboodiri, AIR 1999 SC 981,*** it was observed:-

> "5….In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by reappreciating the

oral evidence.

In view of above, conviction of the petitioner is upheld.

As regards sentence, it cannot be ignored that the occurrence took place 25 years ago and the petitioner is stated to have undergone about three months of custody out of sentence of one year. In these circumstances, ends of justice will be met if instead of sending the petitioner to custody, he is required to pay higher fine and substantive sentence is reduced to the period of sentence already undergone.

Accordingly, sentence of fine is enhanced to Rs.10,000/- and sentence of imprisonment is reduced to the period of sentence already undergone. If the petitioner fails to pay the fine, he will undergo RI for one year.

The petition is disposed of.

April 24, 2007 (Adarsh Kumar Goel)
'gs' Judge